

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.
--

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of CONNIE and ALAN  
VIZARD.

2d Civil No. B170652  
(Super. Ct. No. DR26156)  
(San Luis Obispo County)

CONNIE AGUAYO,

Respondent,

v.

ALAN VIZARD,

Appellant.

Alan Vizard (husband) appeals, in propria persona, from the judgment resolving property and support issues following the dissolution of his marriage to respondent Connie Aguayo (wife). He challenges the trial court's calculation of *Epstein* credits, the amount of child support he was ordered to pay, and contends the court erred by characterizing his disability pension as community property. We affirm but remand with directions to calculate the community interest in husband's disability retirement benefits.

### *Factual and Procedural Background*

The parties were married for 20 years and separated in May of 1998. Wife petitioned for dissolution of the marriage. They have one minor child, a son, born in August of 1987.

In October of 2000, wife filed a motion requesting that the trial court order husband to pay child and spousal support, and attorney's fees in the amount of \$4,500. According to her income and expense declaration, she was employed at Albertson's as a checker and earned approximately \$2,000 gross income per month. Husband was employed at the California Men's Colony as a correctional officer and earned approximately \$60,000 annually.

In January of 2001, the court entered an order requiring husband to pay wife \$318 per month in child support, \$364 per month in spousal support, and pay wife's attorney's fees in the amount of \$2,500.

In August of 2002, pursuant to the stipulation of the parties, the court bifurcated the status portion of the dissolution proceedings. The court ordered that trial of the disputed issues concerning child and spousal support, distribution of the community assets and debts, and attorney's fees would be conducted on April 25, 2003.

Thereafter, wife filed a trial brief stating that the parties' community real property (their home) was sold and the net proceeds of \$104,944.88 remained undistributed in an escrow account. Wife requested the court order all of the community property debts to be paid directly out of the escrow account. She also requested that in determining the community interest in the retirement benefits of both parties, the court use the "time rule." Finally, she requested that husband be ordered to pay child and spousal support, and all of her attorney's fees.

Although husband had been represented by counsel earlier in the proceedings, by the time of trial, he represented himself. According to his trial brief, he was no longer employed as a correctional officer but was being processed for an industrial disability retirement for work-related health reasons. He stated that he had

been paying the monthly mortgage payment of \$1,516 on the community residence since May of 1998 and the fair rental value of the home was \$1,200. He requested that the court order wife to reimburse him for a share of the amount he paid monthly in excess of the fair rental value (\$316 per month).

On April 24, 2003, the court commenced trial of the support issues. Following the hearing, the court issued a tentative statement of decision setting forth the following factual findings: Husband and wife are each 47 years old. Husband has a disabling injury or health condition that prevents him from accepting full-time employment as a correctional officer, but he is otherwise in good health. He was employed by the state as a correctional officer for 27 years and stopped working in October of 2002, after it was determined that he was disabled from the rigors of work as a correctional officer. He applied for a disability retirement and expects to receive \$2,400 monthly in non-taxable income. Wife is employed as a retail clerk at Albertson's Market earning a gross monthly income of about \$2,600. She lives with a man who helps defray her living expenses and acknowledges that she does not have a need for spousal support.

The court found that, historically, the parties' son spent about 5 percent of the time with husband, and the remaining 95 percent of the time with wife. The court ordered husband to pay wife \$572 per month for child support effective May 1, 2003. The court determined that no spousal support would be awarded either party. The court continued the trial to June 27, 2003, to resolve the amount of the community debts, the distribution of the parties' retirement benefits, and the amount of attorney's fees owed by either party. The court specifically ordered husband to "determine the amount of his disability income and all income from other sources before the date of the next hearing."

Shortly thereafter, husband objected to the court's tentative decision, arguing that his son stayed with him more than 5 percent of the time, he had received no income from his employment since October of 2002, and had recently incurred unreimbursed medical bills totaling \$8,000.

On May 15, 2003, the trial court rejected husband's objections and stated that it would reconsider "the order for child support if [husband] supplies information in regard to his income from all sources at the hearing on June 27, 2003."

On June 27, at the continued trial, husband represented himself. Wife's counsel advised the court that the parties had reached an agreement as to the community debts that were to be paid from the proceeds of the sale of the residence. The parties also agreed that husband would reimburse wife \$140 for certain personal property. Counsel advised the court that the only disputed issues were the amount of attorney's fees owed by either party, the amount of credit due husband for mortgage payments he made on the community residence following the parties' separation, and the amount husband owed Century 21 for expenses incurred after the sale of the parties' residence. (See *In re Marriage of Watts* (1985) 171 Cal.App.3d 366 [separate use of a community asset entitles the community to reimbursement or credit]; *In re Marriage of Epstein* (1979) 24 Cal.3d 76 (*Epstein*) [use of separate funds to pay preexisting community obligations entitles party to reimbursement or credit from community].)

On the issue of the *Epstein* credits due husband, wife's counsel advised the court that the parties agreed that the difference between the monthly mortgage payment and the fair rental value of the residence was \$316 per month. Wife's counsel argued that the credits should accrue from January 1, 2001, the date that wife began receiving spousal or child support from husband, rather than from May 1, 1998, the date of separation. Wife argued that she had left the marriage due to repeated incidents of domestic violence, she received a restraining order at one point, and was terrified to seek child and spousal support prior to the fall of 2000, due to a fear of violence. Wife argued that any amount she owes husband arising from his payment of the mortgage from May 1, 1998, to January 1, 2001, should be considered paid in lieu of her receiving an order for child and spousal support for that same period of time.

Husband responded that he should receive *Epstein* credits for 60 months (from May of 1998 through May of 2003) because he made all of the community

mortgage payments without her assistance, her allegations of fear were fabricated, and he has suffered extreme emotional distress from her allegations. He also objected to the amount of attorney's fees she sought on the ground that they were unreasonable.

At the conclusion of the hearing, the trial court ruled, based on a review of the pleadings and various declarations in the record, that husband was entitled to *Epstein* credits from wife in the amount of \$4,424, representing one-half of \$8,848, i.e., one-half of \$316 per month for 28 months from January 1, 2001, to May 1, 2003. The court ordered husband to pay wife's attorney's fees in the amount of \$11,500, with a credit of \$2,500 previously paid, for a total of \$9,000. The court ordered husband to pay child support in the amount of \$572 monthly, commencing May 1, 2003, until the child reaches age 19, or the age of 18 and is not a full-time high school student, whichever occurs first. Finally, the court ordered the parties' retirement benefits to be divided by the "time rule" and ordered the parties to cooperate in the preparation of the necessary documents to distribute the community interest in the retirement plans.

### *Discussion*

#### *I. The Award of Epstein Credits*

Husband first contends the trial court failed to make an equal division of the community property by failing to award the full amount of *Epstein* credits due him for mortgage payments made on the parties' residence. He argues the evidence did not support reducing the amount owed him from 60 months to 28 months, and there was no evidence demonstrating her entitlement to support during the period between May 1998 and January 1, 2001. He notes that wife did not file an income and expense declaration until she moved for temporary support in the fall of 2000. His contention is without merit.

The trial court has inherent equitable power to order pendente lite support. (*Kilroy v. Kilroy* (1995) 35 Cal.App.4th 1141, 1146-1147.) The record reveals that wife sought child and spousal support in her petition for dissolution. The issue was, therefore, raised. In a declaration dated October 17, 2000, wife stated that she had primary custody

of the parties' son following their separation in May of 1998. She stated that one year earlier (in October of 1999) the parties had begun sharing equal custody of their son. She stated that husband was then earning \$60,000 annually (\$5,000 monthly), she was earning \$2,000 monthly, and that her gross monthly income during the previous 12 months was \$2,424. She stated that husband had been claiming the tax exemption for their son. There is evidence in the record, thus, that between May of 1998 and December 31, 2000, husband had substantially more income than wife, wife had primary custody of their son, and wife was not receiving child or spousal support during that period.

Courts have held that reimbursement for *Epstein* credits "should not be ordered if payment was made under circumstances in which it would have been unreasonable to expect reimbursement, for example . . . where the payment was made on account of a debt for the acquisition or preservation of an asset the paying spouse was using and the amount paid was not substantially in excess of the value of the use. [¶] Likewise, reimbursement should not be ordered where the payment on account of a preexisting community obligation constituted in reality a discharge of the paying spouse's duty to support the other spouse or a dependent child of the parties. Both spouses have a duty to support their dependent children." (*In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 747.)

Here, husband was not allowed reimbursement for wife's share of the community mortgage obligation he paid for 32 months between May of 1998 and December of 2000. It was undisputed that he had not paid child or spousal support during this period. The trial court reasonably concluded that husband's payment of the preexisting community mortgage obligation during this period was in reality a discharge of his duty to support the other spouse or their dependent child. The amount for which he was not allowed reimbursement (\$158 per month) was very modest compared to the California statutory guidelines for child support. Husband has not demonstrated that the court abused its discretion in declining to award him *Epstein* credits during the period of time that he had not paid child or spousal support.

## *II. Child Support*

On April 24, 2003, the trial court conducted a trial on the issues of child and spousal support. The court heard testimony from wife and admitted evidence. The record on appeal does not contain a copy of the reporter's transcript of this hearing. The following day, the trial court entered a statement of decision finding that the parties' son had historically spent about 5 percent of his time with husband. Consequently, using this time share and the California statutory guidelines, the court ordered husband to pay child support in the amount of \$572 per month.

As noted above, husband objected to the court's statement of decision, arguing in part that he had not received any income from his employment since October of 2002. The trial court rejected his objections and stated that it would reconsider "the order for child support if [husband] supplies information in regard to his income from all sources at the hearing on June 27, 2003."

At the continued trial date of June 27, 2003, husband did not submit any other information as to the amount of his income, as requested by the court. Nor did he ask the court to reconsider the amount of child support. Consequently, the court did not modify its prior order.

Husband contends the trial court abused its discretion in ordering him to pay \$572 per month in child support. He argues the amount is excessive given his reduced disability income and the fact that his wife shares living expenses with a nonmarital partner. We disagree.

On appeal, the general rule is that "[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent . . . ." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Husband has the burden of affirmatively demonstrating error by providing an adequate record on appeal which will permit review of his contentions. (E.g., *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9.) Where, as here, the record on appeal does not include a transcript of the testimony heard on the

issue of child support, we must presume that ample evidence was presented to support the judgment and that the trial court appropriately exercised its discretion in making its support determination. (See, e.g., *National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 521-522; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 518, pp. 562-564; *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1150-1151 [court's determination to modify a support order is reviewed on appeal under the deferential abuse of discretion test].)

Moreover, appellate review of child support orders centers on whether the trial court adhered to the uniform statewide child support guideline. (Fam. Code, §§ 4052, 4055.) An award pursuant to this guideline is presumptively correct. (*Id.*, § 4057.) Husband has failed to demonstrate that the court failed to apply the guideline amount.

### *III. Division of the Retirement Benefits*

Finally, husband contends the trial court erred in determining that his industrial disability retirement benefits were community property. He argues that his disability benefits are his separate property until he reaches the age of 55, i.e., the age at which he could retire and receive a longevity pension. Our review of this contention is hindered by the incomplete nature of the judgment.

The judgment orders the retirement benefits of both spouses to be divided by the "time rule" and orders wife's counsel to prepare a qualified domestic relations order.<sup>1</sup> Husband informed the trial court that he expected his disability retirement benefits to be about \$2,400 monthly. By ordering his retirement benefits to be divided by the time rule, the court necessarily determined that the disability benefits were community property and that wife would receive a portion of them each month. The

---

<sup>1</sup> Under the "time rule," the community interest in the retirement benefits is determined by multiplying the amount of benefits by a fraction, the numerator representing length of service during marriage but before separation, and the denominator representing the employee spouse's total length of service. (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2004) ¶ 8:1115, pp. 8-263 to 8-264.)



judgment, however, does not contain any findings supporting the characterization of the disability benefits as community property. Nor does the judgment award wife any dollar amount of the disability benefits received monthly by husband or provide for a reduction in husband's monthly income for purposes of calculating his child support obligations once wife begins receiving a portion of the monthly disability benefits. The judgment does not appear, therefore, to be complete. We conclude this matter must be remanded for further proceedings and additional findings.

As a general rule, "disability payments made to a disabled spouse following the dissolution of marriage are the separate property of the spouse receiving said payments. . . . The rationale [for] this rule is that the disability benefits constitute compensation for personal anguish, suffering, disfigurement and loss of earning capacity and are thus akin to damages for personal injury which comprise separate property of the spouse after the dissolution of marriage." (*In re Marriage of Briltz* (1983) 141 Cal.App.3d 17, 20, citation omitted.) However, a disabled spouse cannot defeat the community's interest in a pension or similar retirement benefit. Where disability is taken in lieu of retirement benefits earned during marriage, only that portion above what would have been received as retirement pay can qualify as the employee spouse's separate property. (*Id.* at pp. 20- 21; *In re Marriage of Stenquist* (1978) 21 Cal.3d 779, 788.)

For example, in *Stenquist*, husband suffered a service-related injury in the military. Although qualified for a disability pension, he continued working for another 17 years and then retired after 26 years of service. At that time, he had a choice of taking regular retirement pay at the rate of 65 percent of his basic pay, or taking disability pay at the rate of 75 percent of his basic pay. He elected disability pay and four years later divorced. The trial court characterized the excess of the disability pay over retirement pay as his separate property (compensation for disability) and treated the balance as replacement of retirement pay and therefore community property to be divided. The Supreme Court affirmed, reasoning in part that only a portion of his disability benefits were properly allocable to disability, and that it would be unjust to deprive wife of a

valuable property right simply because a misleading label has been affixed to husband's pension fund benefits. The court explained: "The purpose of disability benefits . . . is primarily to compensate the disabled veteran for 'the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market' . . . and secondarily to compensate him for the personal suffering caused by the disability. Military retired pay based on disability, however, does not serve those purposes exclusively. Because it replaces a 'retirement' pension, and is computed in part on the basis of longevity of service and rank at retirement, it also serves the objective of providing support for the serviceman and his spouse after he leaves the service. Moreover, as the veteran approaches normal retirement age, this latter purpose may become the predominant function served by the 'disability' pension." (*In re Marriage of Stenquist, supra*, 21 Cal.3d at p. 787, citation omitted.) Because the husband had worked 17 years after his injury and retired only after he had acquired a vested right to a retirement pension, the court concluded the primary function of his disability benefits was to provide retirement support rather than to compensate him for loss of earning capacity. (*Ibid.*) Accordingly, the court held that only the difference between the disability pension and the retirement pension could be classified as husband's separate property; the remainder of the pension was community property. (*Id.* at p. 788; *In re Marriage of Mueller* (1977) 70 Cal.App.3d 66, 71 [same].)

In contrast, in *In re Marriage of Samuels* (1979) 96 Cal.App.3d 122, the husband, a federal civil service employee, was injured at the age of 50. He terminated his employment and received monthly disability benefits. Two years later, husband and wife separated. Having completed five years of service prior to his disability, he was eligible at the age of 62 to receive a deferred retirement annuity. The trial court determined that 94 percent of husband's monthly disability benefits were community property and awarded the wife a one-half interest therein payable monthly. The Court of Appeal reversed, holding that the monthly disability benefits were husband's separate property until he reached the age of 62. The appellate court reasoned that "[p]ayment of such

disability benefits now serves the principal purpose of compensating [husband] for his injury, including loss of earnings and diminished earning capacity, and constitutes his separate property . . . . But after [husband] reaches the minimum age (62 years) credited with past service longevity (5 years), the predominant purpose of such payments shifts to retirement support rather than disability compensation resulting from premature retirement . . . ; at that point the true character of the disability benefits commensurate in value to the fully matured retirement benefits based upon completion of five years of service during marriage and salary rank . . . effectively constitutes community property irrespective of the label affixed to [husband's] pension benefits." (*Id.* at p. 128, citations omitted.) The appellate court concluded that since the disability benefits equaled the amount of retirement benefits husband would receive at the age of 62, wife was entitled to one-half of the benefits received by [the husband] once he reached the age of 62. (*Ibid.*)

The Court of Appeal in *In re Marriage of Pace* (1982) 132 Cal.App.3d 548 reached a similar result. There, the husband, a federal civil service employee, and his wife entered into a marital settlement agreement in which the wife was awarded 7/15ths interest in husband's retirement benefits as of the date of separation "'whether accumulations or anticipated retirement at the age of 55,' as her share of the community interest in those benefits." (*Id.* at p. 550.) Prior to reaching the age of 55 and after the parties' separation, husband was injured in an accident and became a quadriplegic. He was involuntarily retired and received disability retirement benefits. When he reached the age of 55, wife sought her share of his disability retirement benefits pursuant to the property settlement agreement. The Court of Appeal held that wife was not entitled to a share of the disability benefits until husband reached the age of 62, the age at which he was eligible for a deferred retirement annuity. The court noted that federal employees were eligible for immediate retirement at the age of 55 if they worked for 30 years. Because husband became disabled prior to working for 30 years, the appellate court found that he was not eligible to receive immediate retirement at the age of 55. He was

only eligible for a deferred retirement annuity at the age of 62. "[Husband's] right to a longevity pension at age 55 failed to vest when he involuntarily left his employment, just as it would have failed to vest had he voluntarily quit. The risk that the pension would not vest was a risk shared by [wife] . . . ." (*Id.* at p. 554.)

In *In re Marriage of Webb* (1979) 94 Cal.App.3d 335, the husband retired from a police department with a permanent disability pension. Wife conceded that the benefits were currently his separate property, but the issue was whether, on reaching age 50 (the retirement age), they became longevity allowances in which the wife had a community interest. Under husband's retirement system, when he reached the age at which he would have qualified for longevity retirement but for his incapacity, i.e., age 50, his disability benefits would be recalculated to equal the amount he would have received had he worked without interruption until eligible for longevity retirement. Under those circumstances, the Court of Appeal held that when husband reached the age of 50, the predominant function of his pension benefits was to provide support as if he had retired from service rather than to compensate him for loss of earnings resulting from compelled premature retirement and a diminished ability to compete in the employment market. The appellate court concluded that wife's community interest should be determined by calculating the ratio between the number of years the husband was employed during the marriage and the total number of years from the date of his hiring to the date he would have become eligible for service retirement. Using that formula, the appellate court concluded that the community interest in the pension benefits husband received after he reached age 50 was 17/25ths, and that wife was entitled to one-half of that ratio as her share. (*Id.* at p. 343.)

Finally, in *In re Marriage of Higinbotham* (1988) 203 Cal.App.3d 322, the Court of Appeal addressed the question whether the wife had a community property interest in the tax savings the husband realized by collecting a disability retirement pension. There, the net benefit under the disability plan was \$400 per month higher than the net benefit the husband would have received under a longevity pension. Applying the

reasoning of *Stenquist* and *Mueller*, the court held that the excess tax savings constituted a true disability benefit and hence were husband's separate property. The court reversed the judgment insofar as it failed to treat as separate property the amount by which the husband's net after-tax retirement payments exceeded the net payments he would have received had he chosen a pension based on longevity alone. (*Id.* at p. 334.)

Here, it was undisputed that husband was involuntarily retired based on a disability at the age of 47. He did not elect a disability retirement in lieu of regular retirement benefits. Under the reasoning of *Marriage of Samuels*, *Marriage of Pace*, and *Marriage of Higinbotham*, it appears that the disability benefits received by the husband are separate property until he reaches retirement age. The record reveals that, at the time of trial, the court did not have an opportunity to calculate the amount of the community interest in husband's disability retirement benefits because the amount of his benefits had not been finally determined by the Public Employees Retirement System. Because the trial was held over 18 months ago, the amount of his disability benefits has surely been determined now. We therefore remand this matter with directions to the trial court to determine the amount of the community and/or separate property interest in husband's disability retirement benefits, consistent with the above authorities.

In calculating the community interest in the disability benefits, the court should consider (1) the age at which husband is eligible to receive a longevity based retirement; (2) the purpose of the disability benefits received by husband, i.e., to compensate him for loss of earnings or to provide retirement income; (3) whether the amount of the disability benefits exceed the retirement benefits husband would receive at retirement age; (4) whether the excess amount of the disability benefits and tax savings, if any, are husband's separate property; and (5) the date at which wife should begin to receive her community property share of husband's disability benefits consistent with the above authorities. On remand, the parties are expected to present evidence on these issues to assist the court.

Once the court determines the community interest in husband's disability retirement benefits and allocates them to the parties accordingly, the court should then reevaluate husband's monthly child support obligation if his monthly income is reduced as a result of the court's determination. The court should also ensure that the qualified domestic relations orders executed by the parties are consistent with the court's findings on remand.

We affirm the judgment but remand with directions to calculate the amount of the community interest in husband's disability retirement benefits consistent with this opinion. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

E. Jeffrey Burke, Judge  
Superior Court County of San Luis Obispo

---

Alan Vizard, in pro. per., for Appellant.

John F. Hodges for Respondent.